

1993

Ada Vee Melin v. James Byron Medlin : Brief of Appellee

Utah Court of Appeals

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In the Utah Court of Appeals, State of Utah

ADA VEE MEDLIN

Plaintiff /Appellee,

v.

JAMES BYRON MEDLIN

Defendant/Appellant.

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BRIEF OF APPELLEE

Appellate Case No. 930040-CA

Appellate Court No. 924900335

An Appeal from the Third Judicial District Court of Salt Lake County,
State of Utah
Honorable Leslie A. Lewis, Presiding

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MAY 27 1993

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IN THE UTAH COURT OF APPEALS, STATE OF UTAH

ADA VEE MEDLIN

Plaintiff and Appellee,

v.

JAMES BYRON MEDLIN

Defendant and Appellant.

BRIEF OF APPELLEE

Appellate Case No. 930040-CA

Appellate Court No. 924900335

JURISDICTION

The Utah Court of Appeals has jurisdiction in this matter pursuant to Utah Code Ann. § 78-2a-3(2)(i) (1992).

STATEMENT OF ISSUES

1. Whether the Trial Court properly exercised its discretionary power in making its award of alimony.
2. Whether the Record was sufficient to support the Trial Court's Findings of Fact and Conclusions of Law.
3. Whether the Trial Court properly exercised its discretionary power to make its division of property.
4. Whether the Record was sufficient to support the Trial Court's property

division.

5. Whether the Record was sufficient to support the Trial Court's award of attorney's fees.

6. Whether the Record was sufficient to support the Trial Court's valuation of the law practice and marital business.

STATUTES

Utah Code Ann. § 30-3-3 (1989); Utah Code Ann. § 30-3-5(3) (1991); Utah Code Ann. § 78-2a-3(2)(i) (1992).

STATEMENT OF THE CASE

Trial in this matter was heard on October 14, 19, and 26, of 1992, before the Honorable Leslie M. Lewis of the Third District Court. The Appellee/Plaintiff (herein generally referred to as the "Plaintiff"), Vee Medlin, was represented by attorney, Kathleen McConkie. Appellant/Defendant, an attorney himself, (herein generally referred to as the "Defendant"), James B. Medlin, appeared Pro Se. After hearing the evidence and making partial findings the court ordered the parties to prepare and submit proposed findings. Defendant failed to submit any proposed findings. After considering the Plaintiff's proposed Findings and the Objections thereto by Defendant, the Court entered its Findings & Conclusions, based in part upon those submitted by the Plaintiff, and entered its Decree of Divorce. Defendant appeals from this judgment.

SUMMARY OF THE ARGUMENT

The parties in this case were married for over 38 years. During that time, the Plaintiff worked to put her husband through law school, sacrificed a career, bore Defendant three children, took care of the home, created the products produced by Word Making Productions (a business which was mostly created and developed by Plaintiff and which now produces a small royalty) despite debilitating health problems and endured the Defendant's mental cruelty (including an illicit affair by the Defendant with his secretary to whom he gave an interest in the parties business). Besides being mentally abusive and committing adultery during the course of the parties marriage, the Defendant was deceitful, duplicitous and engaged in unethical and illegal business practices. Defendant also violated court orders in an apparent attempt to hide assets and avoid the payment of alimony.

Defendant's pattern of deceit, misrepresentation and duplicity carried over into trial and, together with the lifelong pattern described, had the effect of making it impossible to determine at trial either the actual amount of Defendant's income during the course of the marriage or his current assets. It was clear, however, that the sums earned by the Defendant were substantially above what he actually reported or claimed to have earned. However, the Court was able to ascertain that of the two parties, the Defendant was and is able to engage in gainful employment, while the Plaintiff was not.

Because of the Defendant's own deliberate, not credible and misleading testimony regarding his assets and income, his ability to earn a substantial income, the length of the

marriage and the Plaintiff's extremely poor health, financial condition and needs, it was appropriate for the Court to make the property and alimony awards that it did. Indeed, the Court has decided in the only way possible given Defendant's attempt to hide his income and assets. As a result, the Court has not abused its discretion.

ARGUMENT

I. The Court Award of Alimony Is Discretionary and Proper Where Defendant Has Made It Impossible to Determine His Income and the Plaintiff Is Not Able to Provide for Herself.

In a divorce action the "trial court is permitted considerable discretion in adjusting financial and property interests of parties and its actions are entitled to a presumption of validity." *Savage v. Savage*, 658 P.2d 1203 at p. 1203 (Utah 1983). The judgment of the trial court, therefore, will not be overturned "absent [a] showing of abuse of discretion." *Bushell v. Bushell*, 649 P.2d 85 (Utah 1982). It is the burden of the Appellant to show that the "evidence clearly preponderates against findings of the court, or there has be a misapplication of the law, or the court has clearly abused its discretion." *Adams v. Adams*, 751 P.2d 1149 at p. 147 (Utah 1979).

In making its decision, the Trial Court is to consider three factors: the "receiving spouse's financial condition and needs; receiving spouse's ability to earn adequate income; and providing spouse's ability to provide support." *Newmeyer v. Newmeyer*, 745 P.2d 1276 at p. 1276 (Utah 1987); *Paffel v. Paffel*, 732 P.2d 96 at p. 97 (Utah 1986). The "[p]urpose of alimony is to provide support for the wife as nearly as possible at the standard of living she

enjoyed during the marriage and to prevent her from becoming a public charge; this calls for determining financial condition and needs of the wife, her ability to procure a sufficient income for herself and [her] husband's ability to provide support." *Georgedes v. Georgedes*, 627 P.2d 44 at p. 44 (Utah 1981). To make its determination the Court may consider other factors that bear on these issues, such as the fault of the parties; length of the marriage (*Boyle v. Boyle*, 735 P.2d 669 (Utah App. 1987); advance degree or professional license (*Rayburn v. Rayburn*, 738 P.2d 238 (Utah App. 1987); which spouse helped to finance the degree (*Petersen v. Petersen*, 737 P.2d 237 (Utah App. 1987); what the parties gave up during the marriage; the health of the parties; etc. The factors upon which the Trial Court relied in this case were substantial and supported by the record.

A. The Findings of Fact and Conclusions of Law Are Sufficient to Support the Trial Court's Award of Alimony.

The Defendant does not contend that the evidence and findings do not support the fact that the Plaintiff's financial condition and needs, as well as her inability to produce an income for herself, make alimony appropriate. Indeed, Defendant points out the need and inability while selectively omitting the part of the findings that indicate the severity of that need and inability. Findings of Fact. at 11.

Rather, Defendant disputes the adequacy of the Court's findings as to the ability of Defendant to provide the support. The Brief of Appellant quotes Finding of Fact 13 (at Record page no. 387), to wit: "The court finds that Defendant is either unable or unwilling

to pay monthly alimony." The Brief then states: "It is in this finding or lack of other sufficient findings that the Court errs." It goes on to say:

The Court failed, however, to enter adequate findings as to the ability of the paying spouse to provide support. All the Court finds in this regard is that he is unable or unwilling to pay monthly alimony. . . . There is no finding with regard to respondents [sic] income except that he has generated an unknown amount of income from his law practice, that he has marketable skills to earn a living and that he can use those skills to live a life close to the standard of living enjoyed during the marriage. . . The Court has reached a conclusion not supported by facts. (Emphasis added.)

(Brief of Appellant at 11-12.)

Here again, Defendant has selectively omitted to identify on appeal those findings by the Trial Court that "reveal the steps the court took to reach its conclusion on [the] factual issue presented." *Sampinos v. Sampinos*, 750 P.2d 615 (Utah 1988); *Stevens v. Stevens*, 754 P.2d 952 (Utah 1988).

The Trial Court also found as follows:

1. The Defendant "appears to be in, good health, . . . very able-bodied and capable of contributing to his own support and the support of plaintiff."
2. The Defendant has "worked throughout the marriage, practicing law and has generated a significant but unknown amount of income from the practice. That, based upon the testimony, it is clear defendant has

under-valued and misrepresented his law practice income. Defendant has marketable skills to earn a living and can use these to live a life close to the standard of living enjoyed during the marriage." (Emphasis added.)

3. "The Court finds the defendant is not credible on valuing any of the above assets or as to his own income from the practice of law." (Emphasis added.)

4. "The Court finds from all of the testimony, including defendant's, that the defendant has made significant income from the practice of law and has 'commingled' these finds [sic] with Word Making income and has consistently failed to fully reflect this income on tax returns and it cannot now be fully and accurately determined."

5. "The Court finds defendant will soon be eligible to earn social security benefits of \$719.00 a month and has testified he may or may not retire."

Findings of Fact, at 4-6 (See Findings of Fact No. 12, 16, 19, 20 & 21, respectively).

These findings were amply supported by the trial record. Indeed, as to the income of Defendant, the only expert testimony offered was that of a CPA who, after thoroughly reviewing Defendant's available records, testified on behalf of Plaintiff that because Defendant had not reported income and/or commingled funds, it was not possible to determine the exact income of Defendant. *See generally*, Record at 12-150. The requirement

of adequate findings should not be construed so as to require the Trial Court to reproduce three days of testimony and the supporting exhibits; rather it requires only enough facts to "reveal the steps the court took to reach its conclusion". *Sampinos v. Sampinos*, 750 P.2d 615 (Utah 1988). As pointed out above, the Utah Supreme Court has stated that in setting alimony the trial court "must make sufficient findings to demonstrate that it considered the financial condition and needs of the party seeking alimony, that party's ability to produce sufficient income, and the ability of other party to provide support." *Noble v. Noble*, 761 P.2d 1369 at p. 1369 (Utah 1988). The Trial Court made sufficient findings when it stated the general reasons for its findings with enough specifics to enable this appellate court to verify its findings and conclusions in the trial record.

The trial record confirms the above, including that the Defendant is able to contribute to his own support and that of the Plaintiff. For example, the Defendant stated at trial he was planning of retiring. This claim was made in an effort to support his claim that he could not afford to pay alimony. The assertion was, however, directly rebutted by a letter he wrote to the Nebraska Bar in which he inquired about the possibility of obtaining a license for the purpose of practicing law. *Id.* at 179-184. In the letter, however, he specifically asked the Nebraska Bar not to say anything to his wife as he was going through a divorce at the time. *Id.* at 180-181. In addition, testimony at trial indicated that he had received large sums through his practice of law, and by other means, in spite of his testimony that he received only small amounts. *Id.* at 150.

The Defendant also engaged in practices that made it impossible to determine how much he actually earned in his practice of law. Evidence at trial showed, however, that the amounts he earned were substantially in excess of what he claimed (i.e. a \$45,000 legal fee from a single client). Record at vol I, 150, 152; vol III at 77. The Defendant commingled the funds of his law practice with those of Word Making. *Id.* at vol. I, 87, 108, 120, 146, 173-175, 192-193. He did not report substantial amounts of income. *Id.* at vol. I, 143-145; vol II, 53-59. He misappropriated property, without the Plaintiff's knowledge, belonging to Word Making (a business that produced products to help children learn to read) and directed it into improper loans and pornographic films. *Id.* at vol. I, 145-145, 159, 163. He discontinued Plaintiff's insurance (despite her extremely poor health), leaving her uninsurable, claiming lack of funds, although he was able to purchase a satellite dish, VCR and other items for his office, as well as pay for medical bills of his mistress' (*Id.* 35) children. *Id.* at vol I, 172. He engaged in illegal conduct for financial gain by having a friend sell his boat and then claiming it as stolen to collect the insurance money. *Id.* at vol. II, 58. And he disobeyed Court orders regarding the assets of Word making. Record at vol. II at 107. Additionally, although ordered by the Court to pay temporary alimony (amounting to approximately \$15,000.00), Defendant failed to make any temporary alimony payments whatsoever. Findings of Fact, at 12.

All of these acts (together with others found in the record) constituted bad faith on the part of the Defendant and made it impossible for the Trial Court to make an accurate

determination as to the Defendant's income.

The Trial Court is not required to make a specific finding as to the Defendant's income, but could determine that he was either earning more than the evidence indicated or had the ability to earn more money. See, *Osguthorpe v. Osguthorpe*, 804 P.2d 530, 534 (Utah App. 1990). In *Osguthorpe* the Appellate Court noted that the Trial Court found the Defendant to be unreliable as a witness, the Appellate Court therefore deferred "to the trial courts's assessment of the credibility of the witnesses. *Id.* As the Utah Court of Appeals noted in *Boyle*, "[t]he trial court is clearly in the best position to weigh the evidence, determine credibility and arrive at factual conclusions." *Boyle v. Boyle*, 735 P.2d at 670. In this case, the Trial Court, after weighing the evidence, found the Appellant not to be a credible witness.

The Utah Supreme Court has also held lump-sum alimony to be proper and within the discretion of the Trial Court where the "husband's repeated lack of cooperation in divorce proceedings and his refusal to pay temporary alimony ordered by the court . . . indicated likelihood that [wife] would have great difficulty in collecting periodic alimony payments." *Beals v. Beals*, 682 P.2d 862, 864 (Utah 1984). Defendant's actions throughout his marriage and the divorce proceedings make it clear that the Plaintiff would probably "have great difficulty in collecting periodic alimony payments."

It would be unjust, as well as against the evidence, to allow the Defendant to reap the benefits of his dishonest conduct simply because those deliberate actions made it impossible

for the Trial Court to make a "specific finding as to how much James makes on a monthly basis" Brief of Appellant, at 12.

B. The Court's Award of Marital Property as Alimony was Proper.

Defendant's contention that an award of marital property as alimony constitutes error on the part of the court is clearly erroneous. Such property awards are specifically allowed by statute and case law. Utah Code Ann. § 30-3-5(3) (1991), *Beals v. Beals*, 682 P.2d 862 (Utah 1984); *Newmeyer v. Newmeyer*, 745 P.2d 1276 (Utah 1987). Defendant further contends that the trial Court's findings are "conclusory and contradictory" because the court found the Defendant "was either unwilling or unable to pay alimony and yet [found] that he has generated a significant but unknown amount of income from his law practice." Brief of Appellant, p. 13-14. As shown above, the Court's conclusion is completely consistent with the evidence presented at trial, and a more specific statement was impossible due to the Defendant's own purposeful misrepresentations.

Where one of the parties engages in such behavior and refuses to cooperate in the divorce proceedings, "an award of lump sum alimony [is] within the trial court's discretion." *Beals v. Beals*, 682 P.2d 862 (Utah 1984).

Defendant also complains that the court did not make a specific finding as to what his standard of living and living expenses are. *Brief of Appellant.*, at 14. As pointed out above, however, it was the Defendant's own actions that made it impossible for a CPA, qualified as an expert, and the Trial Court to determine the Defendant's actual net worth and income. *See*

generally, Record at 12-150. It was determined that substantial sums were misappropriated and/or not reported. Record at vol. I, 50-52, 108-113. Where the court is unable to determine the actual amount of assets and income due to a party's bad faith, it is appropriate to make an award that will protect the innocent party. *See*, 24 Am. Jur. 2d § 940 (1983). Defendant's actions have been such that a division of property as proposed by Defendant would leave the Plaintiff financially destitute and unable to support herself or pay for her health care expenses, while the Defendant is fully capable of earning a living.

II. The Property Division Made by the Court was Proper, Where the Fault Of The Defendant Made It Impossible For The Court To Determine His Income And The Plaintiff Was Not Able To Provide For Herself.

Defendant contends further that the division of property is not equitable, and seeks to have the appellate court disregard the only credible evidence offered on value of the assets and determine that the Trial Court abused its discretion under the circumstances.

The division of property made by the Trial Court was fair and equitable given the conduct of the Defendant. (See discussion above.) Evidence produced at trial indicated that the Defendant had routinely understated his income, had mismanaged and misappropriated funds of the business Plaintiff was mostly responsible for creating and developing early in the marriage, had failed to keep adequate records, had depleted retirement benefits, had canceled Plaintiff's insurance, and had misrepresented these facts to the Trial Court. The Evidence further indicated that it was not possible to make an accurate evaluation of Defendant's assets and earning capacity, due to his actions. However, it was clear that

substantial amounts of income had come into his possession and were no longer to be found.

The Court took evidence on the value of the assets from a qualified expert and further found that the Defendant was "not credible on valuing any of the above assets or as to his own income from the practice of law." Findings of Fact, no. 19 at 6. Accordingly, the only credible evidence was that offered by the expert.

The basic rule as to division of property between spouses is that the court should make such order in relation to the property as may be equitable. *Bushell v. Bushell*, 649 P.2d 85, 87 (Utah 1982), citing *Hamilton v. Hamilton*, 562 P.2d 235 (Utah 1977). Defendant would have this court not only disregard his conduct but also the only credible evidence on value of the assets, and in turn reward him for his unethical and obstructive behavior by overturning the Trial Court's division of property. Equity demands otherwise!

The Trial Court is "permitted considerable discretion in adjusting financial and property interests of parties and its actions are entitled to a presumption of validity." *Savage v. Savage*, 658 P.2d 1201 (Utah 1983); *Gill v. Gill*, 718 P.2d 779 (Utah 1986). The Trial Court properly made a finding based upon the appropriate circumstances and its decision is entitled to a presumption of validity. Given the circumstances of this case, especially the egregious acts of the Defendant, there has been no abuse of that discretion.

III. The Court Properly Ordered Defendant To Pay For Plaintiff's Attorney Fees Where Defendant Made It Impossible For The Court To Determine His Income, Where Defendant Violated Court Orders, Where Plaintiff Is Not Able To Gain Employment, And Where The Award Is Authorized By Statute.

Attorney fees are specifically provided for by statute. Utah Code Ann. § 30-3-3 (1989). In a divorce case, there must evidence of need and reasonableness of the amount. *Newmeyer v. Newmeyer*, 745 P.2d 1276 (Utah 1987); *Beals v. Beals*, 682 P.2d 862 at p. 864 (Utah 1984). The "[r]elevant factors of reasonableness include 'the necessity of the number of hours dedicated, the reasonableness of the rate charged in light of the difficulty of the case and the result accomplished, and the rates commonly charged for divorce actions in the community.'" *Beals v. Beals*, 682 P.2d 862, 864 (Utah 1984), *citing*, *Kerr v. Kerr*, 610 P.2d 1380, 1384-85 (Utah 1980). In the present case, the need is clearly present. The Plaintiff has no income, is unable to work, is in poor health, and has significant expenses. Record at Findings of Fact, at 2-4. The Defendant on the other hand is capable of earning a living, and was engaged in the practice of law. Findings of Fact, at 4-5. Further, the Defendant has engaged in unethical, even illegal conduct, that has resulted in large amounts of money being secreted from the Plaintiff's control and which necessitated a considerable amount of extra legal work. As a result, the costs of litigation were increased -- due directly to the Defendant's actions and not those of the Plaintiff. The Trial Court specifically found that the amounts sought by the Plaintiff were reasonable and not excessive. Findings of Fact, at 5. Both the decision to award attorney fees and the amount of such fees are within the sound

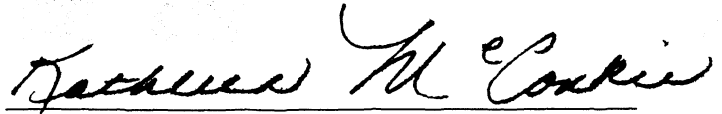
discretion of the trial court. *See, Crouse v. Crouse*, 817 P.2d 836 (Utah App. 1991); *Peterson v. Peterson*, 818 P.2d 1305 (Utah App. 1991); *Burt v. Burt*, 59 Utah 457, 204 P. 91 (1922). Reasonableness is discretionary as well. *Peterson v. Peterson*, 818 P.2d 1305 (Utah App. 1991); *Openshaw v. Openshaw*, 80 Utah 9, 12 P.2d 364 (1932). Further, an award for the expenses of prosecuting the suit is not restricted to those cases where the party receiving the award is destitute, but may be awarded in the trial court's discretion when the circumstances and fairness dictate. *See, Weiss v. Weiss*, 111 Utah 353, 179 P.2d 1005 (1947). In this case, not only was the Plaintiff in need of the assistance, but the Defendant's actions were such that failure to grant attorney fees to the Plaintiff would have been inherently unfair.

CONCLUSION

The marriage in this case was one of long duration (38 years), the appellant has suffered serious health problems and is unable to work or otherwise provide for herself. To a large extent, Plaintiff's poor financial situation has been the fault of the Defendant due to his bad faith, unethical, and improper actions. The Defendant, on the other hand, is able to support himself and to contribute to support of the Plaintiff. Any difficulty in determining

Defendant's ability to meet his support obligation, real or imagined, has been due solely to his own actions. Plaintiff, therefore, asks this Court to uphold and affirm the judgment of the trial court in this matter.

RESPECTFULLY SUBMITTED this 24th day of May, 1993.




Kathleen McConkie
Attorney for Plaintiff/Appellee

CERTIFICATE OF DELIVERY

I certify that on the 26th day of May, 1993, I placed in the mail, postage prepaid, four copies of the foregoing *Brief of Appellee* to the following:

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ADDENDUM

EXHIBIT 1, FINDINGS OF FACT

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

ADA VEE MEDLIN,	:	FINDINGS OF FACT AND
Plaintiff,	:	CONCLUSIONS OF LAW
vs.	:	CIVIL NO. 924900335
JAMES BYRON MEDLIN,	:	
Defendant.	:	

This matter came on regularly for trial on the 14th day of October, 1992, at the hour of 8:30 a.m. before the Honorable Leslie A. Lewis. Plaintiff was present in court and was represented by counsel, Kathleen McConkie. Defendant was present in court and represented himself, pro se. The Court heard testimony as to jurisdiction and grounds, and as to property allocation and alimony. The Court, having heard the testimony of the parties and other witnesses and argument of counsel for both parties, and having considered all of the evidence received at trial, and having considered plaintiff's proposed Findings of Fact and Conclusions of Law, and defendant's Objections, the Court now makes and enters its Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. The Court finds that both parties are residents of Salt Lake County, State of Utah, and have been for more than three months immediately prior to the commencement of this action.

2. The Court finds that it has jurisdiction in this matter and that the waiting period has passed.

3. The Court finds that the parties have been married since the 23rd day of June, 1954.

4. The Court finds that irreconcilable differences have arisen in the marriage between the parties, making continuation of the marriage impossible, and that the plaintiff is entitled to a Decree of Divorce from the defendant on that basis.

5. The Court finds that this is a long-term marriage (38 years) and that the parties have no minor children; and that during the marriage plaintiff has raised the parties' children, and run the parties' home.

6. The Court finds that the parties are both 61 years of age and that the plaintiff has a master's degree in speech pathology, and the defendant has a juris doctorate.

7. The Court finds that the plaintiff has not been regularly employed in a full-time capacity, out of the home, since early in the marriage, and has no licensure to teach, and that the defendant is a licensed lawyer, who has practiced law since 1957.

8. The Court finds that the plaintiff worked full-time to put defendant through law school and that plaintiff has always been the primary caretaker of the parties' children.

9. The Court finds that the plaintiff used her master's degree in speech pathology and her creativity and business acumen to create and develop the Word Making Production business very early in the marriage, and that she has developed a new product for Word Making, as recently as 1991, while she was at home.

10. The Court finds that plaintiff is largely responsible for the creation and development of Word Making Production, and that most of the products that comprise that business were strictly her creation.

11. The Court finds that at present plaintiff is unemployed and is experiencing serious and significant health problems, most of which will exacerbate over time, these include but are not limited to, a severe hearing loss, a shorter right leg, right hip and ankle problems, a "crippled

foot", chronic sinus problems, cancer (double mastectomy), severe rheumatoid arthritis (affecting the feet, spine, neck, elbows and hands), some vision problems, memory loss, severe dental problems, respiratory problems, and ongoing problems with fatigue, severe pain and difficulty with sleeping.

The Court bases this finding on the plaintiff's testimony, and the defendant's testimony that plaintiff has had "poor health from the beginning of the marriage", and on the Court's own observations concerning the plaintiff's appearance, demeanor, walk, and speech. The Court finds that plaintiff is severely impaired at this point and is unable to work at the present time. The Court further finds that these medical problems necessitate ongoing medical treatment, expenses and the taking of prescribed medication.

12. The Court finds that defendant has testified to, and appears to be in, good health, with the exception of a minor hearing problem, and appears very able-bodied and capable of contributing to his own support and the support of plaintiff.

13. The Court finds that defendant is either unable or unwilling to pay monthly alimony.

14. The Court finds that plaintiff's reasonable monthly expenses are in excess of \$2,160.33 per month (that figure does not include food), as set forth in Exhibit 50.

15. The Court finds the alimony award set forth herein will allow plaintiff to live close to the standard of living enjoyed by the plaintiff during the marriage.

16. The Court finds the defendant has worked throughout the marriage, practicing law and has generated a significant but unknown amount of income from the practice. That, based upon the testimony, it is clear defendant has under-valued and misrepresented his law practice income. Defendant has marketable skills to earn a living and can use these to live a life close to the standard of living enjoyed during the marriage.

17. The Court finds that plaintiff needs assistance from the defendant in paying her attorney's fees; and that plaintiff's counsel, Ms. McConkie's, testimony supports the fees and costs as reasonable and necessary. The Court finds that at least 36 hours of counsel's time, at the rate of \$115.00 an hour, was expended (through 8/31/92), and \$40.00 an hour was billed for her paralegal, for a total of \$9,112.79 in costs and fees and that Ms. McConkie's testimony as to her hourly rate and the reasonableness of the fees and their necessity was credible. The fees and costs as set forth in detail on Exhibit 51 are found to have been necessary. Additionally, the Court finds more time has been expended since

8/31/92 in hearings, trial preparation and trial, and Ms. McConkie is entitled to a reasonable fee for that as well.

18. The Court finds, based upon the testimony of Mr. Topham and Mr. Duncan, that the marital home is valued at \$162,000, and Word Making is valued at \$75,000, and the defendant's law practice is valued at \$35,000.

19. The Court finds the defendant is not credible on valuing any of the above assets or as to his own income from the practice of law.

20. The Court finds from all of the testimony, including defendant's, that the defendant has made significant income from the practice of law and has "commingled" these finds with Word Making income and has consistently failed to fully reflect this income on tax returns and it cannot now be fully and accurately determined.

21. The Court finds defendant will soon be eligible to earn social security benefits of \$719.00 a month and has testified he may or may not retire.

CONCLUSIONS OF LAW

ALIMONY:

1. Plaintiff is entitled to permanent alimony based upon the length of the marriage, her health and inability to

generate income and the parties' standard of living during the marriage and the plaintiff's needs, and defendant's capacity to generate income. A permanent alimony award is needed to equalize the parties' respective standards of living. Therefore:

A. Defendant's one-half share of the equity in the parties' home on Ksel Drive shall be awarded to plaintiff as permanent alimony.

B. All royalty monies paid to Word Making Productions, Ltd. from the Pro Ed contract approximately (\$2,687.00 per quarter for an indeterminate time) shall also be awarded to plaintiff as alimony.

C. Additionally, one dollar (\$1.00) a year in permanent alimony is to be paid by defendant to plaintiff.

D. Defendant is to provide documentation (tax returns and pay stubs) of his income on a yearly basis to plaintiff, due on or before May of each year. The plaintiff has the right to have alimony reviewed by the Court on an Order to Show Cause calendar if defendant's income increases substantially, such that alimony should be increased.

HEALTH AND MEDICAL INSURANCE

2. Defendant is to obtain and maintain health, accident, and dental insurance for the plaintiff for a period of three

years. In the event that insurance coverage should not be sufficient to pay all expenses, plaintiff is responsible for all uncovered actual expenses and deductible expenses not covered by the insurance (including routine office visits).

PROPERTY

3. During the course of this marriage, the parties have acquired real property and an eighty percent (80%) interest in a business, Word Making Productions, as well as other personalty and realty. The Court finds that an equitable distribution of such assets should be as follows:

A. The plaintiff should be awarded the following:

- (1) Half of the equity (\$156,000) in the Sandy home on Ksel Drive (valued at \$162,000) as part of her property distribution.
- (2) Household furnishings; in her possession with the exceptions set forth herein.
- (3) One-half Golden Eagle contract.

B. The defendant is awarded:

- (1) Word Making Productions, Ltd.
- (2) Law office business
- (3) Household property
- (4) Car

- (5) Both IRA's
 - IRA of Vee Medlin
 - IRA of James Medlin
- (6) Vested Retirement Plan
- (7) Vested Keogh
- (8) One-half Golden Eagle Contract

4. Defendant shall be awarded Word Making Productions, Ltd. along with the obligations associated therewith. The defendant agrees to hold plaintiff harmless from any and all liabilities associated with Word Making Productions, Ltd. and indemnify her thereto.

5. The fair market value of the parties' marital home, located at 2775 Ksel Drive, Sandy, Utah, was determined to be \$162,000 with an approximate balance of \$6,400 on the first mortgage. This home is awarded to the plaintiff as her sole and separate property, subject to her assuming the obligations for the first mortgage and holding the defendant harmless therefrom. Defendant shall quit-claim his interest in the marital residence on or before the entry of the Decree of Divorce. The plaintiff is awarded a one-half interest in the home as part of her share of marital property and she is

awarded defendant's one-half interest in the equity in the home, as part of the alimony award in this case.

PERSONAL PROPERTY

6. During the course of this marriage, the parties have acquired items of personal property. The parties have heretofore effected a fair and equitable division of these items between them. Each of the parties should be awarded the household furniture and personal property now in their possession, except that the Court finds the defendant is entitled to the Italian Revival dining table and chairs, the grandfather clock, and walnut Chippendale secretary which were inherited from his mother.

Defendant is to make arrangements to pick up the items of personal property in the possession of plaintiff on or before December 30, 1992, on a date certain, convenient and agreeable to both parties. If defendant does not pick up said property on that specified date, the plaintiff should have the right to dispose of that property as she sees fit.

7. The defendant should be awarded the 1985 Honda CRX automobile and should assume the obligations associated therewith.

DEBTS AND OBLIGATIONS

8. During the course of this marriage, the parties have incurred debts and obligations, both jointly and in their

separate names. The plaintiff should assume the first mortgage on the home located at 2775 E. Ksel Drive, Sandy, Utah, and hold the defendant harmless therefrom, in the approximate amount of \$6,400 with a monthly payment of \$416.66. The defendant should assume the payment of all back taxes on that said property, including but not limited to the taxes due for 1992. The current tax in the amount of \$2,209.16 is due and owing on or before November 30, 1992. Defendant should pay those taxes on or before that date. The delinquent taxes on the marital property are \$2,252.77. Defendant should assume and pay said tax debt, as quickly as can be arranged and hold plaintiff harmless therefrom and indemnify her thereto. Specifically, the defendant should pay any and all debts or amounts due, associated with defendant's law practice, Word Making's retirement fund, the Visa obligation, as well as the debt, if any, to Ms. Nagasawa. The defendant should be responsible for all other marital debts of the parties. In addition, the defendant should specifically pay the \$704.00 due and owing on the furnace repair, \$350 for half of the furniture and personal property appraisal, and \$450 which is the amount due on the appraisal on the marital home.

The defendant is responsible for any debts owed by Word Making Productions or obligations owed to Word Making Productions and/or to its retirement fund.

9. Plaintiff has a right to and a Judgment should enter for all past due temporary alimony awarded in the amount of \$15,000. Defendant should pay plaintiff the past due amount from the IRA accounts and/or the vested Keogh account. That amount should be paid on or before November 20, 1992.

RETIREMENT INTERESTS

10. The defendant is awarded all retirement funds accrued during the course of the parties' marriage, including vested Keogh plans, IRA's and vested retirement in Word Making Productions, Ltd.

ATTORNEY FEES

11. The defendant is ordered to pay all of plaintiff's attorney's fees and costs incurred in this action, which amount is due within ninety (90) days, but may be paid on a reasonable schedule, from the date of the entry of the Decree of Divorce, and a Judgment for the costs already incurred, set forth on the exhibit submitted to Court is entered. Defendant should pay fees and costs directly to plaintiff's counsel, Kathleen McConkie, 1200 Beneficial Life Tower, 36 S. State Street, Salt Lake City, Utah 84111. Defendant is to make payment

arrangements with plaintiff's counsel within fourteen (14) days of this Decree. Plaintiff's counsel, Ms. McConkie, is to file a supplemental affidavit on fees within five (5) days of this Ruling.

INJUNCTION

12. The Court enjoins the defendant from contacting, attempting to visit or to harass the plaintiff in any fashion, or going on or near plaintiff's property without plaintiff's permission. Further, the Court enjoins both parties from making threats against the other or to counsel.

MISCELLANEOUS PROVISION

13. Each of the parties should execute such deeds, contracts, agreements, or other conveyances as may be necessary to transfer the property awarded to the parties. *Ms. McConkie is to prepare a decree consistent with these findings within 5 days.*
Dated this 1 day of December, 1992. *etm*



LESLIE A. LEWIS
DISTRICT COURT JUDGE

MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing Findings of Fact and Conclusions of Law, to the following, this 1 day of December, 1992:

Kathleen McConkie
Attorney for Plaintiff
36 S. State, Suite 1200
Salt Lake City, Utah 84111

James Byron Medlin
Pro se
2875 S. Main Street, Suite 201A
Salt Lake City, Utah 84115-3500

Caroline Matheson

STATUTES

Utah Code Ann. § 30-3-3 (1989)

(3) The court may order either party to pay to the clerk a sum of money for the separate support and maintenance of the adverse party and the children, and to enable such party to prosecute or defend the action.

Utah Code Ann. § 30-3-5(3) (1991)

(3) The court has continuing jurisdiction to make subsequent changes or new orders for the support and maintenance of the parties, the custody of the children and their support, maintenance, health, and dental care, or the distribution of property and obligations for debts as is reasonable and necessary.

Utah Code Ann. § 78-2a-3(2)(i) (1992).

3(2) The Court of Appeals has appellate jurisdiction, including jurisdiction of interlocutory appeals, over: . . .

3(2)(i) appeals from district court involving domestic relations cases including, but not limited to, divorce, annulment, property division, child custody, support, visitation, adoption, and paternity; . . .